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REVERSAL OF CRIMINAL CAUSES ON TECHNICAL GROUNDS.

Considerable interest has been aroused by our recent editorial, entitled "The Failure of American Criminal Law," (67 Cent. L. J. 411), in which we called attention to that defect to which we believed, such failure was to be attributed, to-wit, the persistent inclination of appellate courts to reverse criminal causes for such error in the pleading, instructions or admission or exclusion of evidence, which, properly considered in relation to the whole case, could not be said to have materially affected the result.

Our indictment against the courts has been suggested as too severe. We might say, in answer to this, that we hesitated long before assuming the position which we did in this matter and did not arrive at the point where we were compelled to fix the entire responsibility for whatever failure there has been in America, upon the appellate courts until we had carefully consulted the authorities and the views of men learned in the science and administration of law.

Thus on December 4, 1906, President Roosevelt said in a message to Congress: "I would like to call attention to the very unsatisfactory state of our criminal law, resulting in large part from the habit of setting aside the judgment of inferior courts on technicalities absolutely unconnected with the merits of the case, and where there is no attempt to show that there has been any failure of substantial justice." On June 26, 1905, in an address before the Yale Law School on "The Administration of Criminal Law," Judge (now president-elect) Taft said: "No judgment of the court below should be reversed, except for an error which the court, after reading the entire evidence, can affirmatively say would have led to a different result." These quotations represent the views of practical statesmen, who reflect more accurately possibly, than any other two men the opinion of the general American public.

Moreover, this rule is peculiar to American jurisprudence. In England, where for a while, it is true, what is known as the Exchequer heresy obtained, to-wit: "that any ruling that was erroneous created a right to a new trial for the defeated party," the rule has always been in civil and criminal cases that the erroneous admission or rejection of evidence was not to be considered a sufficient reason for setting aside the verdict and ordering a new trial "unless some substantial wrong or miscarriage has been thereby occasioned on the trial." This is one of the rules of the English Appellate Court and also appears in the provisions of the Indian Evidence Act of 1872, where it is provided that "the improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case, if it shall appear to the court before which such objection is raised, that independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that if the rejected evidence had been received, it ought not to have varied the decision."

In this country many courts cherish the Exchequer rule and defend it on the following grounds, to-wit: (1). Because a party has a legal right to the judicial observance of the rules of evidence *per se;* (2), Because the judicial consideration of the weight of all the evidence, as a motive for refusing a new trial, would be a usurpation of the functions of the jury. Professor Wigmore, in his treatise on Evidence, Sec. 21, clearly shows the fallacy of both these contentions, first, because no man has a "legal right" to have his case wrongly decided, and second, because, if it is not usurpation to *set aside* a verdict in a criminal case because it is against the evidence it surely is not usurpation to *sustain the verdict* where the erroneous exclusion or rejection of evidence could not in the mind of the court have any tendency to change the result.

Professor Wigmore's severe castigation of the American courts for holding to this

heresy is many times more harsh than was ours in the editorial referred to and will bear to be repeated here in support of our previous views as heretofore indicated in these columns. Professor Wigmore says: "As to the practical workings of the Exchequer rule, the results are lamentable. Whether in civil or criminal cases, it has done more than any other one rule of law to increase the delay and expense of litigation, to encourage defiant criminality and oppression and to foster the spirit of litigious gambling. . . . The federal supreme court has been especially callous in pushing the technical rule to extremes, notably in its treatment of some of the rulings of the late Judge Parker. of the Western Arkansas District, one of the greatest trial judges of the federal bench, whose work for law and order in that region was inestimable; examples may be found in Allen v. U. S., tried in 1893, reversed in 150 U. S. 551, reversed again in 157 U. S. 402, 17 Sup. Ct. 154; in Starr v. U. S., reversed in 1894 in 153 U. S. 614, and again in 1897, in 164 U. S. 627, 17 Sup. Ct. 223; and in Brown v. U. S., reversed three times in 150 U. S. 93, 159 U. S. 100 and 164 U. S. 221. Of the above three defendants (all charged with homicide), whose cases were reversed, Starr subsequently pleaded guilty to manslaughter; and to several charges of robbery; Brown pleaded guilty to manslaughter and Carver was on a third trial, convicted of murder; in short, the appellate courts' total achievement proves to have consisted merely in blocking justice for several years, and to have helped to diminish in a turbulent community that respect for law and justice which the trial court, if unhampered, was able to maintain. . . . . In the present day the last remnant of the irrational element is our law of new trials. The primitive ordeals of fire and water were not more calculated to deify chance or chicanery as the arbiter of litigation than is this dominant contemporaneous practice of granting new trials for an immaterial slip in the rules of evidence. The most trifling error, "works a reversal" in the same wizard-like manner that the mispronounced word in the superstitious formulas of the Germanic litigation lost for the party his cause. This modern doctrine is the more discreditable of the two. They knew no better then. We do know better; yet we preserve this technical trumpery."

With the practice thus severely condemned why do the American appellate courts (with a few commendable exceptions) cling to it with such tenacity? "But so deep rooted is his tendency," says Judge Amasa M. Eaton, president of the Congress of Uniform Legislation, "that legislation against it has not always been found to be enough to overcome it. In New York and New Jersey statutes to cure it have proved ineffectual, while in Kentucky it has been overcome by legislation. But in too many states professional instinct from within and professional reserve from without—the demand of the bar to be allowed to win by technicalities—have been too strong. Successful (?) criminal practitioners strive purposely to create error to lay the ground for reversal and a new trial, thus making the law the tool of injustice."

We believe that, to make any substantial headway against this iniquitous practice, the bar itself must be enthusiastic for its abolishment. And in this connection we commend the attitude of the Alabama bar association, which, some time ago, sent a communication to the president of every state bar association, calling attention to the wave of criticism on this subject throughout the country. It pointed out that under the English practice less than three and a half per centum of appealed cases are reversed, while in the United States, forty-six per centum are reversed, upon technical errors of pleading and practice; and concluding that the reversal of cases and the granting of new trials on technical errors irrespective of the correctness of the verdict, was inimical to the peace and welfare of the country, and the commercial progress of its people.

NOTES OF IMPORTANT DECISIONS.

HOMICIDE—MUST A THREAT OF DEFENDANT TO BE ADMISSIBLE AS EVIDENCE SPECIFICALLY DESIGNATE THE DECEASED.—The rule as to the admissibility of threats of defendant to prove homicide is that they must be sufficiently specific to clearly point out the deceased as the object thereof. The recent case of Bradley v. State (Tex.), 111 S. W. 732, in enforcing this rule complains that it is not always in the interest of justice and that the courts have gone too far in extending this rule.

In the case cited the defendant complained that the court erred in permitting the state to ask the defendant if he did not, on the evening of the homicide, tell George and Gibson Dodd that he was going to kill a man with that knife, to which defendant answered that he did not; and it was proved by Gibson Dodd that defendant, while peeling some peaches, which witness and his brother had given defendant, with the knife, introduced in evidence as the one with which the killing was done, was asked by George Dodd what he was going to do with that big knife, to which appellant replied, "Kill a man." Appellant insists this testimony was not admissible, since it did not indicate that deceased was the party alluded to; furthermore, because the witness said he paid no attention to defendant, and thought the defendant was joking.

The court reluctantly felt itself obliged to hold that the admissibility of this evidence was error. The court said: "The record shows defendant had a very large knife that he had recently bought, and, while passing where the Dodd boys were in an orchard, asked them for some peaches, which being given appellant, he took out the knife and began to peel the peaches, and one of the Dodd boys asked him what he was going to do with that big knife. He says, 'Kill a man.' The record further shows that there had been a great deal of bickering and animosity between appellant and deceased. The writer of this opinion thinks the authorities have gone too far in holding that a threat of this character must specifically designate the deceased as the party intended to be injured, and I think the evidence above detailed shows with sufficient certainty that deceased was the party alluded to by appellant when he said, 'I am going to kill a man.' But this testimony is not admissible under a long line of authorities of this court. See Hall v. State, 43 Tex. Cr. R. 257, 64 S. W. 248; McMahon v. State (Tex. Cr. App.), 81 S. W. 298; Holley v. State, 39 Tex. Cr. R. 301, 46 S. W. 41; Gaines v. State, 38 Tex. Cr. R. 202, 42 S. W. 397; Earles v. State (Tex. Cr. App.) 85 S. W. 1; Garrett v. State (Tex. Cr. App.) 106 S. W. 389."

THE RIGHT OF ESCAPE FROM APPARENT DANGER AS AFFECTING AN ACCIDENT INSURANCE POLICY.—A CRITICISM OF THE CASE OF BANTA v. CASUALTY COMPANY.

A very recent and yet unpublished decision, handed down by the Missouri Court of Appeals, presents the question of distinction in the liability of an accident insurance company for an accident, insured against, where there is an attempted escape from apparent danger.[1]

It is too well settled for any citation of authority to be needed, that one, attempting to escape from threatened danger arising out of negligence, may recover for injury resulting from such attempt, or the proper party may sue for a death thereby caused. The question in tort is one of action in an emergency caused by a real or apparent danger attributable to the negligence of the party liable therefor. It is understood, of course, that an insurer against accidental injury or death need not be connected in any way with the cause of such injury or death, any more than in life or fire or marine insurance, the insurer is connected with the cause of the event insured against. In short, liability arises or not, in insurance, out of contract, while the other sort of liability rests on tort.

The Decision in the Banta Case.—The facts of the Banta case show an accident policy issued to a commercial traveler with double indemnity, according to the following clauses: "If injury as before described is sustained while the insured is (1) riding as a passenger and is in or upon any railway passenger car using steam, cable or

(1) Banta v. Continental Casualty Co.

electricity as a motive power, or (2) a passenger on board a steam vessel licensed for the regular transportation of passengers, or (3) a passenger in an elevator provided for passenger service only, or (4) in a burning building, as owner, guest, or tenant, the company will pay double the indemnity otherwise payable under Parts I or II of this policy. Double indemnity shall not be payable for any loss resulting from injury sustained while getting on or off, or being upon the step or steps of any railway or street railway car." Insured while riding on a street car was injured by jumping therefrom while it was going rapidly, "with a view to avoiding injury in an impending collision of said car with a traction engine or threshing machine which was crossing the tracks." He "alighted on the ground with such violence that the tibia of his right leg was fractured." The conductor and motorman and some of the other passengers also jumped. The collision actually occurred. The remaining passengers, who did not jump, were not injured. It does not seem, however, to be claimed by the insurer that there existed no emergency which justified plaintiff in jumping, as it tendered to plaintiff single indemnity.

The question, therefore, was squarely presented, whether or not plaintiff was deprived of the benefit of double indemnity as a passenger "in or upon" the car from which he had jumped, so as to escape being injured or killed by the impending collision. The lower court held, in effect, that the plaintiff had not left the car, in contractual contemplation, and this conclusion the Missouri Court of Appeals reversed by a unanimous decision. We believe the holding of the lower court to have been correct from various points of view, and that this conclusion is the only conclusion consistent with the trend of judicial interpretation of insurance contracts.

General Rule of Construction.—The rule is well settled, and the opinion of the reversing court in this case concedes it, that policies are construed strongly against the insurer.[2]

Before proceeding, however, to give instances of literalism, which have been rejected by the courts because amounting to a practical abolition of the contract of insurance, it may be well to notice the treatment the court in the principal case gave to the provision relating to double indemnity, whereby the conclusion was arrived at, that the contract was so clearly adverse to plaintiff, that the rule above referred to found no room for its application. The court considered only fragmentary parts of the provisions quoted, viz.: That relating to a passenger "in or upon" any railway passenger car, and what is said about "getting on or off" and "being upon the step or steps," etc. Such a consideration may or may not be sufficient to understand the purpose intended. Construing words or clauses in their context is generally deemed the safer course to pursue.

Double Indemnity Clause as Relating to "Passengers."—Taking into consideration the entire clause concerning double indemnity, common to nearly all accident policies, and it is discovered that if an insured is a passenger in either of three places, or in a fourth place, in another capacity, at the time of receiving injury, from accidental cause, he becomes entitled to double indemnity. The description of the capacity in which he must be in either of such places is just as certain and unambiguous as anything could be, and is carefully specified as to each place. Thus, it is clear, that, if he were there in any other capacity he would not be entitled to double indemnity. The prime purpose, therefore, seems to me to be to indicate the relationship the insured must sustain to the place, presence in which entitles him to such indemnity. So long, therefore, as he maintains that rela-

(2) Meadows v. Pac. Mut. L. Ins. Co., 129 Mo. 76, 50 Am. St. Rep. 427, 31 S. W. 578; Standard L. & Acc. Ins. Co. v. Thornton, 100 Fed. 582, 40 C. C. A. 564, 49 L. R. A. 116; DeLoy v. Travelers' Ins. Co., 171 Pa. 1, 32 Atl. 1108, 50 Am. St. Rep. 787; Equitable Acc. Ins. Co. v. Osborn, 90 Ala. 201, 9 So. 869, 13 L. R. A. 267.

tionship to the place, generally speaking, he is insured in double indemnity, and when the relationship ceases he is remitted to single indemnity. Now, to be a passenger in or on a railway train or a street car, is to begin one's journey and have the right to continue therein or thereon to his journey's end. Specified details in the insurance policy as to where a passenger in or on a train shall or shall not be in a car, may merely be cautionary statements implied by the relationship itself, or they may even be limitations beyond that. At all events, such details recognize the relationship and the essence of the contract lies in its maintenance. Now, who would contend that the jumping of plaintiff from the car severed that relationship? If not, he received his injury while he was a passenger, and, according to the rule in negligence cases, while he was in the proper place for a passenger.

Is it cleared that insured was not insured in the precise capacity he sustained to the car he was "in or upon?" The proviso seems to me to imply the contrary. What is said about "being upon the step or steps" means, under the rule of *inclusio unius, exclusio alterius,* that he is protected everywhere else. What is said about "getting on or off," means by every fair interpretation of language that though the relationship of passenger is then existent, double indemnity is suspended during the voluntary performance of such an act, and under the same rule of inclusion and exclusion nothing else does suspend it.

Insured Responsible for Voluntary, Not Involuntary Violations of Terms of Policy.—There can be no other act meant than a voluntary act. It would seem puerile to contend to the contrary. The cases have gone much further in carrying to insurance provisions the idea of voluntary action than into such a collocation of words. Thus where cutting one's own throat while insane and not thereby intending to kill himself was claimed to be an accident, the contention was allowed on the ground of the absence of intention.[3] And where a voluntary act, such as "voluntary over-exertion" is excepted, a further qualification has been added requiring the over-exertion not only to be voluntary, but also to be intentional over-exertion, either with a consciousness of the result or from reckless disregard of the consequences to ensue.[4] It has also been held that the over-exertion forbidden by the policy is not that which results from an effort by insured to escape injury in an emergency, even though the over-exertion be not qualified by the description of voluntary.[5] There are many cases, which discuss the poison clauses in insurance contracts with the result of rejecting their literalism on the supposition that no such sense could have been intended. For a thorough review of such cases, it is sufficient to cite the case of Dezell v. Insurance Co.,[6] wherein it is said: "The better reason supports the rule that such exceptions in such policies do not cover medicine (even though it contain poison), or anything taken or administered in good faith to alleviate physical pain, even though it results in unexpected and unintentional death."[7]

Construction of "In or Upon a Car."—Now that we have seen that the passenger relation, as it exists between the parties who create it, does not require that a passenger shall remain in or upon a car in the face of imminent danger, and the contract of insurance merely provides against a cer-

(3) Blackstone v. Standard L. & Acc. Ins. Co., 74 Mich. 592, 3 L. R. A. 486; Mut. Ben. L. Ins. Co. v. Daviess, 87 Ky. 541.

(4) Rustin v. Standard L. & Acc. Ins. Co., 58 Neb. 792, 79 N. W. 712, 46 L. R. A. 253; Johnson v. London Guar. & Acc. Co. 115 Mich. 86, 40 L. R. A. 440. In the Michigan case it was observed by the court that "accident insurance is not designed to furnish indemnity only in case where the policyholder orders his conduct with grave circumspection and a provident foresight of consequences."

(5) Reynolds v. Insurance, 1 N. Y. Supp. 738, 121 N. Y. 649.

(6) 176 Mo. 253.

(7) The same theory of construction is applied as to a provision as to inhaling gas. It has been held it must be voluntary. Fidelity & Casualty Co. v. Waterman, 161 Ill. 632, 44 N. E. 287.

tain voluntary act, while the insured is, in fact, a passenger, why should he not be doubly indemnified, when the prime purpose of the contract is to give double indemnity to a *passenger?* This question is not answered by anything in the case of Aetna Insurance Co. v. Vandecar,[8] where the word "in" was construed, even if Judge Thayer's dissenting opinion is disapproved. In the Vandecar case the court said the insured must have received the injury while "in" the car. Here the clause says, "in or upon" the car. The same language in the Vandecar case would have saved the case, for no point is made of the fact that the actual injury was sustained after Vandecar fell on the ground by reason of an involuntary departure from a forbidden place on the car. That case is really in support of the lower court's holding in the principal case, unless it may be said that plaintiff's leaving the car was a voluntary act. But if express inhibition against taking poison or having it administered to an insured does not prevent its being taken or administered merely to relieve pain, and forbidding over-exertion does not operate to make an insured especially circumspect, far less to make one refrain from any exertion that may save him from grave danger, how can it be said "that plaintiff was forbidden to retreat from a place where his life was threatened, especially when to do this did not dissever him from the capacity as to which he was doubly insured?" The policy provided that the insured must be in or *upon* the car when the accident happens. In the principal case the plaintiff was *upon* the car, even though he may have gone out upon the platform and jumped therefrom only when the danger became imminent. Or, in other words, where the plaintiff jumped with the occurrence of the accident or in view of its immediate occurrence in order to save his life, then, at the time of such involuntary and forced action, he was *in or upon* the place provided in the policy for double indemnity, and should be regarded as being within such provisions of the policy, and not penalized for involuntary actions occurring practically coincident with the accident.

If a passenger, under such a contract, is actually precipitated, by direct physical force from where he was entitled to be, upon the ground, and there suffers injuries, there would be no question of his right to recover double indemnity. If it appear to him that he will be precipitated outside of the car, should he remain, or suffer death or injury within the car, is not his act of jumping an indirect precipitation, and, the relation of passenger being unaffected, is he not, contractually speaking, still "in or upon" the car?"

The abstract of the evidence in the principal case does not disclose whether there was a clause in that particular policy found in many, if not usually, the greater number of such policies, that accused shall not expose himself to unnecessary danger. But let us suppose it contains such a provision. Then, if plaintiff seeing the danger ahead, and being able to avoid it by jumping, failed to do so, would there not be, at least, a question for the jury as to whether he was entitled to recover at all? If one must try to save himself, is the space allotted to the effort for salvation within the limits where he is "cribbed and confined?" And if so, why so? It is against the interest both of insured and insurer, that thus these contracts should be interpreted, and any construction of that kind must be deemed a violent effort to save the letter at the expense of the spirit of the contract. I do not believe a case may be found in the books where any interpretation will go to this extent, if by any possibility, in the fair range of reason, any such conclusion may be avoided. Every man contracts for his supposed advantage; otherwise he would not contract at all.

Denial of Right to Escape as Affecting Public Policy.—But suppose the contract should state explicitly and unambiguously, that insured being doubly insured only

(8) 86 Fed. 282.

while "in or upon" the car should not, on pain of losing such double indemnity, leave the car, even for the purpose of saving life or limb, whenever actual danger might be imminent, would not such a provision be contrary to public policy? If such a provision cannot be put into a policy by express terms, it surely cannot be supposed as being in it by any process of interpretation. But whether there, expressly or impliedly, it is, in our opinion, forbidden by a sound public policy. Directly expressed such a clause instinctively shocks the moral sense. Public policy forbids that any one may provide for the performance of an illegal act to save conditions of a contract, and this principle is so clear, that authority is not needed in its support. It undoubtedly is illegal for a man to agree that he will sacrifice his life, if necessary, to save an accident policy against forfeiture.

Same—As Rendering Contract "Valueless."—It has been held that it is, in effect, to make a man pay a consideration for a thing that is "nugatory and valueless," if an accident insurance company may "avoid liability for injuries sustained by the insured while performing necessary acts embraced in his classified occupation."[9] In that case the policy was issued to one as "a cattle dealer or broker visiting yards by occupation," and it was held that as to him the clause not extending double indemnity to a part of the car "not provided for occupation by passengers" was invalid. In the case of a passenger train conductor a similar clause to the one in the Banta case about "getting on or off" was held invalid, "as such acts are necessary and justified by such an insured."[10] In Missouri, where the words were "when caused by accident while traveling by public or private conveyance provided for the transportation of passengers," it was held they constituted no objection to recovery by an engineer riding on his engine, as the policy "must have been designed to cover something more than the ordinary risk incurred by a passenger or traveler."[11]

Now, if the courts invalidate such provisions, in policies to which we have just referred in order to secure to policy holders something of practical value in particular avocations, shall it be thought that such provisions are to stand, when in an emergency of great danger they will be either valueless to any policy holder, whatever his avocation or pursuit, as, in the alternative, he suffers injury or death? Such an interpretation follows a literalism which is, in a general sense, opposed to the interest of both insurer and insured, subordinates the principal purpose of the insurance, and makes it valueless in contingencies where it is supposed to be of value.

Proximate Cause—General Considerations.—The question of proximate cause in accident insurance is quite generally determined, according to the construction to be put on special provisions of the policy. We do not notice in the record of the principal case any such provision, and while it would be instructive, and more or less relevant to notice some of these provisions as construed in the light of the legal principle which underlies them, an inquiry to be at all exhaustive would demand an independent article. We shall therefore call attention only to certain general principles which may be of value.

To do this it may again be of interest to notice the dominant idea in the double indemnity clause. This occurs to us to be, that for the purpose of making this kind of insurance attractive, the insurer has chosen certan hazardous situations, in which every man may expect to be found, and tells the purchasing public that an insured, while in them is doubly insured. Every one of us expects to be on a railroad or street railway car, or a steamship or an elevator, and we are more than likely to be caught in a burning building. In each and every

(9) Richards v. Travelers' Ins. Co., 18 S. D. 287, 100 N. W. 428, 67 L. R. A. 175.

(10) Dailey v. Pref. Masonic M. Acc. Assn., 102 Mich. 289, 57 N. W. 184, 26 L. R. A. 171.

(11) Brown v. Ry. Passenger Assurance Co., 45 Mo. 221.

one of these cases an effort to escape from threatened danger is as much to be expected, as that danger should be threatened. Therefore, such effort is contemplated by insurer and insured, and the reasonable result, therefore, of such effort is contemplated. In a comparatively recent case decided by the Supreme Judicial Court of Massachusetts that court, speaking by Judge Knowlton, said: "What kind of a cause is to be deemed "proximate" within the meaning of the policy? Where different forces and conditions concur in producing a result, it is often difficult to determine what is properly to be considered the cause, and in dealing with such cases the maxim *causa proxima non remota spectatur* is applied. But this does not mean that the cause or condition, which is nearest in time or space to the result, is necessarily to be deemed the proximate cause. It means that the law will not go further back in the line of causation than to find the active, efficient, procuring cause, of which the event under consideration is a natural and probable consequence, in view of existing circumstances and conditions. The law does not consider the cause of causes beyond seeking the efficient, predominant cause, which, following it no further than those consequences that might have been anticipated as not unlikely to result from it has produced the effect.[12] Surely jumping is far within what was "not unlikely to result," and it may be said that no attempt to escape would have been such an unlikely thing to occur as to have made such quiescence altogether remarkable.

Same—Analogous Cases Construing Fire Policies.—In a comparatively recent case it has been held, in the face of a provision that the insurer was not to "be liable for loss caused directly or indirectly by explosion of any kind, unless fire ensue," that this did not relieve from losses caused by an explosion, where the explosion is preceded by the fire which caused the explosion, because it being a direct result of the fire, its effect is within the terms of the policy.[13] A more apposite case, however, to the precise question here involved arose in Maine, where it was held that the damage and expense caused and incurred by removing with that degree of care suited to the occasion insured goods from an apparently imminent destruction by fire were within the contract of insurance.[14]

Same—Exemptions from Liability as Original, Not Intermediate Causes.— In the case of Russell v. German Fire Ins. Co.,[15] it appeared that the three-story building of plaintiff stood next to a five-story structure that was consumed by fire. The unsupported wall adjacent to the former building was, seven days' later, as the direct result of a strong wind, blown down upon plaintiff's building. He sued under his fire policy for the damage. The policy contained a clause that it was "in no case to include loss or damage by cyclone, tornado or windstorm." The court regarding this exception as meaning that "cyclone" et al. were referred to as original causes, and not intermediate agencies, then considered the question of the chain of causation having been broken. The court said: "The inquiry resolves itself to determining whether or not the wind was an *incident* in the chain of events or the *primary* cause. If at the time the contract was entered into, windstorms of the character which arose on the night of December 20th (the fire occurring December 13th) were liable to occur at any time, then the parties contracted with reference to such a possibility. If they could reasonably have foreseen that a fire might leave the wall exposed to winds likely to occur, and that such wind might blow it down, then such contingency was an element of the risk. * * * The question is not alone, how much was the standing wall

(12) Freeman v. Mercantile Mut. Acc. Co., 156 Mass. 351, 30 N. E. 1013, 17 L. R. A. 753.

(13) Cohn & Greenman v. Ivy Co., 96 Mo. App. 315. See also Renshaw v. Ins. Co., 103 Mo. 606.

(14) White v. Iusurance Co., 57 Me. 91.

(15) 100 Minn. 528, 111 N. W. 400, 10 L. R. A. (N. S.), 326.

weakened by the fire, but rather: Did the fire leave the wall in such an exposed condition that the wind produced an effect which would not have been produced except for the fire." See also Cincinnati, etc., Railway Co. v. Acrea.[16]

The Russell case announces a principle clearly applicable to accident policies, and especially to contracts similar to that under consideration in the Banta case. In continuing an exemption from liability for losses "resulting from injury sustained while getting on or off" a car, should not, applying the principle announced in the Russell case, such exemption be construed as applying only to original and not to intermediate agencies. That is, should not such a provision apply only to cases where the act of getting off or on was, itself, the sole, original cause of the injury, and not to cases where the imminence of danger involuntarily impels a man in the ordinary course of nature, to jump to save his life? In such cases, the act of jumping is an intermediate cause of the injury, and therefore not of importance to the parties at the time the contract was made.

Construction of Term "Riding."—A case in which the word "riding" has been construed, rejects the exact literalism of its import in cases like the principal case. In the case referred to, Judge Day, now on the Federal Supreme Court, in affirming the judgment of the lower court quoted extensively from the charge of the trial judge and said it "was as liberal as the defendant could properly require." The quoted portion thus specially referred to said: "What is meant by the phrase 'while riding on the platform or steps of any railway car?' The very literalism of the words would cover every possible injury or death which did not take place inside the car and away from any platform or steps, while the car is in motion. * * * We have the authority of several cases cited in the argument that the phrase 'standing, being or riding on a platform or steps,' which is obviously a broader phrase than 'riding on the platform or steps,' will not be so rigidly construed as defendant's request would construe the language under consideration. Because says Judge Wallace, 'these words do not refer to a transitory occupation of the platform.' Sartelle v. Assurance Co., 15 Blatchf. 216, Fed. Cas. No. 12392. Nor would being on the platform, for relief, when one was suffering from car sickness or nausea be held to be 'a voluntary exposure to unnecessary danger,' or 'riding on a platform' as held in Marx v. Insurance Co. (C. C.) 39 Fed. 321. These are examples construing the phrase, which seem to establish the principle of reasonable interpretation, that, although the insurance company has ample power to make its contract what it pleases, in the absence of express and ambiguous words, it will not be understood to have forbidden that temporary, transitory and necessary occupation of the platforms which a traveler must risk in the use of the cars and trains for the convenient prosecution of his journey."[17]

In a Minnesota case it was held that the clause "standing, being, or riding on a platform of moving railway coaches" barred recovery against an insured who went out upon the platform, intending to get off when the train should stop at a certain switch. The court, in its opinion, was, however, careful to say: "It (going on the platform) was a voluntary act, not prompted by any *sudden emergency* or necessity." And the distinct terms of the contract cannot be made to yield or cease to be operative, from consideration of mere convenience to the assured."[18]

This appears to us as a most exact statement of the proper rule in construing all such provisions in accident policies. A distinction must be made as to "sudden emergencies" and "necessities" as being with-

(16) 40 Ind. App. 150, 82 N. E. 1009.

(17) Standard L. & Acc. Co. v. Thornton, 100 Fed. 582, 40 C. C. A. 564.

(18) Hill v. Equitable Acc. Assn., 41 Minn. 231, 42 N. W. 936.

in the contemplation of the parties to the contract, as contra-distinguished from "considerations of mere convenience."

N. C. COLLIER.

St. Louis, Mo.

SALES—WARRANTY IN EXECUTORY CONTRACTS.

ROSENBAUM GRAIN CO. v. POND CREEK MILL & ELEVATON CO.

Supreme Court of Oklahoma. Nov. 12, 1908.

Where wheat is sold under an executory contract, and the wheat delivered is inferior in quality to that contracted to be sold, the buyer may retain the inferior wheat delivered, and recover the damages he has sustained by reason of a breach of the seller's contract, without returning the wheat, or giving any notice to the seller.

This action was brought in the district court of Grant county by plaintiff in error, plaintiff below, to recover from defendant in error, defendant below, the sum of $326.26, with interest. The amount sought to be recovered, as alleged by plaintiff in his petition, is a balance due on overdrafts attached to bills of lading for grain sold by defendant to plaintiff. Plaintiff alleges that during the years 1903 and 1904 plaintiff purchased from defendant, at different times, car load lots of wheat upon offers of a certain price made by plaintiff and accepted by defendant, and that, upon being notified of the acceptance by defendant of each order made by plaintiff, plaintiff in a written communication confirmed each purchase, and that by the terms of said purchase, as evidenced by the letters of confirmation, it was agreed that the weights and grades should be the weights and grades taken in Ft. Worth, Tex. Plaintiff alleges that in this manner several car loads of grain were purchased by plaintiff from defendant and shipped by defendant from Pond Creek, Okl., to plaintiff at Ft. Worth, Tex.; that at the time of making each shipment defendant, before the weight and grade of any such shipment had been ascertained at Ft. Worth, drew a draft upon plaintiff for the estimated amount of any such shipment, which draft was paid by plaintiff when presented; that plaintiff paid drafts thus drawn by defendant in the total sum of $9,311.21; and that the total amount of the purchase price of the wheat shipped by defendant to plaintiff in the various shipments according to the grades and weights at Ft. Worth, Tex., amounted to $8,984.95, leaving a balance due the plaintiff in the sum sued for. A copy of the communication signed by plaintiff confirming each purchase was attached to plaintiff's petition, and is in words and figures as follows:

"Chicago, Ill. Ft. Worth, Texas.
"217 Rialto Building. Wheat Building.
"J. Rosenbaum Grain Company.
(Incorporated)
"Grain and Seeds.

"Fort Worth, Texas, ———, 190—,
"Pond Creek Mill & Elevator Co., Pond Creek, O. T.

"Dear Sir: We confirm purchase from you to-day of ——— cars ——— bushels No. 2 Hard Wheat at ——— delivered ——— f. o. b. ——— shipped within ——— days by Fort Worth, Texas, weights and grades. Ship to J. Rosenbaum Grain Co., North Fort Worth, Texas, and don't fail to note on B. L. 'For Export'; Make draft on us B. L. attached, at Fort Worth, Texas, leaving fair margin.

"Always advise us of shipments, stating kind of grain, number and date of contract to be applied on, and number of bushels in car.

"When shipments are not made according to contract, we reserve the right, without further notice, to extend the time of shipment, or cancel the sale, or buy in the grain for shipper's account, unless at your request previous to expiration of limit of time of shipment other arrangements are made covering your failure to make shipment within specified time of original contract.

"Inspection, trackage and exchange charges to be paid by shipper. All cars must be loaded to capacity. In referring to this purchase, please use this contract No. ———

"Yours truly, J. Rosenbaum Grain Co.,
"By ———.

"No. 3, 58 pounds or better, 1 cent off; 57 pounds 2 cents off; 56 pounds, 3 cents off, No. 4, 55 pounds or better, 4 cents off; 54 pounds 5 cents off; 53 pounds 6 cents off; 52 pounds 7 cents off. Anything below No. 4 will be taken into account according to quality and condition if merchantable."

Defendant by answer made general denial of the allegations of plaintiff's petition. The case was tried to a jury, who returned a verdict in favor of defendant.

HAYES, J. (After stating the facts as above): Plaintiff insists upon reversal of this case upon two grounds: First, that the court erred in not granting plaintiff a new trial, for the reason that the verdict of the jury is not supported by sufficient evidence,

and is contrary to law; second, that the court erroneously gave to the jury an instruction which we shall discuss later.

It is contended by defendant as his defense that the written confirmation of purchase mailed by plaintiff to defendant after each purchase was not part of the contract of sale between the defendant and plaintiff, and, further, that the wheat upon arrival at Ft. Worth was not properly graded. The charges of plaintiff in his account against defendant were made for shortage in weights and grades of the grain as weighed and graded at Ft. Worth, Tex. Each transaction between the parties was initiated by an agent of the plaintiff located at Enid, who testified that he, daily and weekly, sent cards to defendant making offers for purchase of wheat at stipulated prices; that most of the purchases were made by one or the other of the parties calling the other over the telephone and closing the deal; and that immediately upon any such transaction between him and the defendant he reported the same to his principal office at Ft. Worth, Tex. The testimony further discloses that, upon receipt of such reports from its agent at Enid, plaintiff immediately, or soon thereafter, forwarded to defendant written confirmation of such purchase containing the terms and conditions of the form attached to plaintiff's amended petition. The agent of the defendant, on the other hand, testified that the sales by it to plaintiff were made by transactions over telephone between it and the plaintiff's agent at Enid; that the grade of wheat sold by it to plaintiff was to be No. 2 hard wheat, and that each car shipped by it to plaintiff was No. 2 hard wheat, and that the same was weighed through defendant's hopper scales into the cars, and properly weighed and that the letters of confirmation from the plaintiff were not received by it in many instances, if in any instance, until after the shipments had gone forward. Upon the phase of the case as to whether plaintiff's confirmations of purchase were parts of the contracts of purchase, there is conflict in the evidence, and the court properly submitted this question to the jury upon an instruction which was requested by the plaintiff in the following language: "If you believe from the preponderance of all the evidence that the different purchases of wheat by the plaintiff from the defendant was to be settled and governed by the written confirmations of purchase introduced in evidence, then the rights of the parties are to be governed by said written contracts, and the weights and grades and conditions of such contract are binding upon both parties."

The evidence as to the grades and weights of the various shipments at Ft. Worth come entirely from witnesses of plaintiff, but the evidence of plaintiff's witnesses as to the grading of one or two cars on which a rebate of 11 cents per bushel is charged by plaintiff against defendant is not without conflict. The inspector who inspected all of said wheat testified that the classification by him of the wheat in one of said cars as "no grade" was for the reason that said car of wheat was badly mixed with corn. It developed, however, in the testimony of this same witness that he inspected this car of wheat twice; that his first classification of it was as hard wheat No. 2, testing 59 pounds to the bushel; that after about 500 bushels of the wheat had been emptied from said car he reinspected the car, and found in one corner of same wheat badly mixed with corn, and he thereupon regraded the wheat as "no grade" wheat, for which plaintiff charged defendant back on the contract price 11 cents per bushel on the entire car of wheat. The testimony is that 500 bushels of wheat unloaded from the car subsequent to the first inspection and prior to the second inspection was of the grade contracted for, and that of the wheat remaining in the car at the time of the second inspection but 200 bushels was affected by mixture with corn, that its being mixed with corn was the only reason for grading it as "no grade" wheat, and the only reason for grading the entire car as "no grade" wheat was because of this mixture of some of the grain in the corner of the car with corn. The wheat was graded under the rules of the Boards of Trade of Galveston and Kansas City, which rules prescribe that "no grade" wheat should consist of grain that is wet, hot, or in a heated condition, badly mixed with other grain, or various substances, and impregnated with some odor weevily or weevily-eaten. An employee of defendant who loaded said car in which said wheat mixed with corn was found testified that there was but very little of the wheat in which there was any corn and that said wheat was not badly mixed with corn, and that in the entire car there did not exist over a bushel and a half of corn. Under the state of the evidence, as to whether the letters of confirmation of sale in which it was stipulated that Ft. Worth grades and weights should control were a part of the contract, and, as to the proper grading of the wheat at Ft. Worth, we do not think the court erred in refusing to set aside the verdict of the jury, for the reason that it was not supported by the evidence. It is a well-settled rule in this jurisdiction that, where there is any evidence tending reasonably to support the verdict of the

jury, the court will not interfere. Brock v. Williams et al., 16 Okl. 124, 82 Pac. 922; Puls v. Casey, 18 Okl. 142, 92 Pac. 388.

The court, upon request of defendant, and over the objection of plaintiff, gave the following instruction to the jury: "If you find from the evidence that the defendant contracted to sell and deliver to the plaintiff at Ft. Worth, Tex., wheat of a certain grade to be paid for by the plaintiff at a certain price, and if you further find that the defendant delivered the wheat so contracted for but that the plaintiff claimed the wheat so delivered was not of the grade contracted for, then you are instructed it was the duty of the plaintiff to notify the defendant of its claim before receiving the wheat, and if you further find that the plaintiff receiving the wheat so delivered and unloaded the same into its elevator, and converted the same to its own use, before notifying the defendant or giving the defendant an opportunity to replace the wheat with other wheat of the kind and grade contracted for, then your verdict must be for the defendant, unless you further find from the evidence that the plaintiff and defendant contracted the manner in which the wheat purchased should be settled for." The language of this instruction is inaccurate for the purpose of adapting it to the evidence before the jury, but the idea it conveys to us, and which we think it would reasonably convey to any jury, is that the jury, if it found that the defendant contracted with plaintiff to sell and deliver to it wheat of a certain class—that is, hard wheat No. 2—and defendant did deliver wheat to plaintiff, but not of the grade contracted for, then, before plaintiff could claim a reduction in price for same, it must have before receiving the wheat notified defendant of plaintiff's objection to the grade of the wheat. This instruction in effect is that the purchaser under an executory contract with a warranty by the seller as to grade or character of the property sold cannot receive the same if such property is not of the grade and character warranted and sue on breach of warranty for damages without first having given notice to the vendor and offered to return the property. Such is not the law. In this case there is no controversy whatever that the wheat defendant agreed to sell to plaintiff and the wheat contracted for by plaintiff from defendant was to be hard wheat No. 2. If defendant failed to carry out its contract by delivering to the plaintiff wheat not of the grade contracted, and thereby breached its warranty as to the grade of the same, plaintiff was not bound upon receipt of the wheat to give defendant notice of the condition thereof and an opportunity to replace it with the grade of wheat contracted.

In 2 Mechem on Sales, § 1811, it is said: "In the ordinary case of breach of warranty, either express or implied, notice of the defect or an offer to return the property to the seller is not in any respect a condition precedent to the buyer's right to maintain an action for the breach of warranty." In Dayton v. Hooglund, 39 Ohio St. 671, the court held that "in a suit for the price of a lot of iron manufactured by the plaintiff for the defendant the defendant, in case there is a breach of warranty as to the quality of the iron, may recoup for such damages as he has sustained, although he has used the iron without offering to return it." In Graff v. Osborne & Co., 56 Kan. 162, 42 Pac. 704, the Supreme Court of that state says: "Where merchandise is sold under an executory written contract, and the goods delivered are inferior in quality to those contracted to be sold, the buyer is not restricted in his remedy to a return of the goods and rescission of the contract, but may retain the inferior articles delivered, and, in an action for the purchase price, may recoup the damages he has sustained by reason of the breach of the seller's contract." Other cases in which this rule has been applied are Tacoma Coal Co. v. Bradley, 2 Wash. 600, 27 Pac. 454, 26 Am. St. Rep. 890; Underwood v. Wolf, 131 Ill. 425, 23 N. E. 598, 19 Am. St. Rep. 40; English et al. v. Spokane Com. Co., 57 Fed. 451, 6 C. C. A. 416; also 24 Am. & Eng. Ency. of Law, 1158, and authorities there cited; 2 Benjamin on Sales, p. 1156.

This instruction was error. Plaintiff does not contend that he ever gave to defendant notice of the defect in the grade of said wheat before it received same and unloaded it into its bins. The giving of this instruction by the court was therefore tantamount to instructing the jury to return a verdict for defendant, although it should find that defendant contracted to deliver wheat of a specified grade and that the wheat delivered by the defendant was of an inferior grade, for the reason that no notice was given the defendant of such defect in the wheat prior to the time plaintiff received the same, and converted it to its own use. For the error of the court in giving this instruction, the case should be reversed; and it is so ordered.

WILLIAMS, C. J., DUNN, TURNER, and KANE, JJ., concurring.

NOTE.—*Does Mere Description of Property Constitute a Warranty in Executory Agreement For Sale?*—The principal case assumes the only thing as true as to which any dispute might be made. It is so generally true that, where personal property is sold upon a warranty, the purchaser has the right to retain and recoup his damages, or if he has paid the purchase price, retain and sue, investigation is not needed. But there is a conflict of decision as to whether there is any warranty, express or implied, in selling property by name or description, and it seems to me that the weight of authority is against the ruling in the principal case.

Thus Benjamin on Sales (7th Am. Ed.), Sec. 600, says: "When the vendor sells an article by a particular description, it is a condition precedent to his right of action that the thing which he offers to deliver should answer the description."

But, "A warranty is an express or implied statement of something which a party undertakes shall be a part of the contract, and though a part of the contract, collateral to the express object of it, but in many cases the circumstance of a party selling a particular thing by its proper description has been called a warranty; but it would be better to distinguish such cases as a non-compliance with a contract which a party has engaged to fulfill." This principle of condition precedent and waiver of compliance is followed very closely by the New York Court of Appeals in a long list of cases. Thus Walk v. Talbot, 167 N. Y. 712, 60 N. E. 288, 82 Am. St. Rep. 712, cites a prior case (Carleton v. Loubard, 149 N. Y. 137, 43 N. E. 422), that where there is sale of a particular thing by terms of description, these "are not considered as a warranty at all, but conditions precedent to any obligation on the part of the vendee, since the existence of the qualities indicated by the descriptive words, being part of the description of the thing sold, become essential to its identity, and the vendee cannot be obliged to receive and pay for a thing different from that for which he contracted. The tendency of the recent decisions in this court is to treat such words as part of the contract of sale descriptive of the article sold and to be delivered in the future, and not as constituting that collateral obligation which sometimes accompanies a contract of sale and known as a warranty."

In a late case in Illinois (American Theatre Co. v. Siegel, Cooper & Co., 221 Ills., 145, 77 N. E. 588, 4 L. R. A. [N. S.] 1167), it waœs said: "The law does not permit a person to receive goods under a contract, appropriate them to his his own use and then defeat an action for the purchase price on the ground that the goods were not of the exact quality or description called for by his contract. His remedy, in the absence of a warranty, is to refuse to accept the goods when delivered, or to return them within a reasonable time after the departure from the terms is discovered."

In Michigan the condition precedent theory, the case of Brick Motor Co. v. Reid Mfg. Co., 150 Mich. 118, 113 N. W. 551, showing a sale of motors and transmissions, defects in which were not discovered until after they had been installed in automobiles sold to customers. The court said: "It was the clear duty of defendant (purchaser) under repeated decisions of this court to examine and test the machines as they were delivered. It waived any defects discoverable by reasonable inspection and those which it did discover but accepted the goods after such discovery. It did not waive latent defects." The case of Talbot Pav. Co. v. Germain, 103 Mich. 403, 27 L. R. A. 96, is quite an elaborate discussion of the condition precedent theory, and particularly is it interesting in rejecting the implied warranty theory, in the view that there is no middle ground between express warranty and condition precedent, where by executory agreement articles are to be sold by words of description. In Breen v. Moran, 51 Minn. 525, distinguished by the Michigan case last above alluded it was seen that the implied warranty was as to suitability of an article for a particular purpose not whether it was what it was sold for as an article.. There is Wisconsin authority very late in date, agreeing with the principal case, but it rather seems that the tendency is stated by the New York court.

It would seem true, that if one agrees to sell one a mule, and an ass is delivered and accepted that should be an end of the matter.

Of course there are circumstances when articles should not be redelivered, but nothing of exigency appears in the principal case. Where time of delivery is essential—for example if a certain grade of coal were to be delivered to a manufacturing plant, and an inferior grade is forced upon the purchaser by reason of seller's default, in that he cannot make arrangements elsewhere to keep a plant from shutting down, authority can be found to show there is not a waiver of a condition precedent by the acceptance. A good illustration of an implied warranty is found in a late case from Indiana, which also seems to rule on the line of New York Court of Appeals. See Oil Well Supply Co. v. Priddy, 83 N. E. 623. That case showed the furnishing of a certain brand of pipe that broke when it was attempted to use same. The court said there was an implied warranty as to suitability which distinguished the sale from that of merely defining a particular brand of pipe in a sale. That case seems on all fours with the case that is annotated.

CORRESPONDENCE.

A PUZZLING WILL QUESTION.

Editor Central Law Journal:

Here is copy of a will which was drawn by a country lawyer, which I, as one of your subscribers have just probated in county court of Cass County, N. Dak. It may be interesting for you to scan. I figure a life estate is vested in two minors and fee in remainder to eldest daughter. Give the profession a chance to guess.

A. W. CUPLER,
Fargo, N. Dak.

I —— ——— of Lucca in the County of Barnes and State of North Dakota, being of sound mind and memory, and considering the uncertainty of this frail and transitory life, do therefore make, ordain, publish and declare this to be my Last Will and Testament.

First, I order and direct that my executrix hereinafter named, pay all my just debts and funeral expenses as soon after my decease as conveniently may be.

Second, After the payment of such funeral

expenses and debts, I give, devise, and bequeath unto my two sons Ernest and Eriz, to share and to share alike, all of my property, both real and personal, and mixed of which I may die possessed.

Third, As my two sons above named are minors and invalids, it is my further will that the use and possession of all the property of which I may die possessed, shall go to my executrix, provided that she takes care of and provides for my said sons above named, as their needs and necessities may demand, and as a recompense for such maintenance, my said executrix, is to have the use, possession, and profits of said property, for and during such time as she takes care of said boys. In case of her inability to act in this capacity, then the above provision is to apply to any person appointed by the court to take care of my two sons above named.

In case either of my sons above named as my heirs, should die, then, and in that case, the title to the property devised and bequeathed hereinbefore, shall go to the survivor. In case both of the said boys should die, then the title to said property shall go to my married daughter Mary.

It is also my will that my executrix shall pay or cause to be paid to my daughter Selma the sum of $100 on her 18th birthday, the said sum to be taken out of the proceeds or profits of the property in question, provided, however, that such payment shall be not made at said time, if either or both of my sons above named, are alive at that time. Providing, further, that in case of their dying after her 18th birthday and while she is still alive, the said sum is to be paid to her.

Lastly, I make, constitute and appoint my daughter, Mrs. Mary ———— to be executrix of this my last will and testament, hereby revoking all former wills made by me.

In testimony hereof, I have hereunto subscribed my name and affixed my seal the 30th day of August in the year of our Lord, one thousand nine hundred and seven.

BOOK REVIEWS.

JONES ON INSOLVENT CORPORATIONS.

A most important work on a hitherto uncovered subject of law has been prepared by Mr. S. Walter Jones, entitled "A Treatise on the Law of Insolvent and Failing Corporations." The work does not pretend to be a learned disquisition of ancient principles; in fact, it brushes aside all preliminaries and introduces the question of the insolvent corporation in the very first chapter and then in each succeeding page, blazes a path of its own through hitherto uncorrelated materials.

The work opens with a discussion of the general nature of insolvent corporations, and the questions of "insolvency," "bankruptcy" and "inability to pay." Then follows a recapitulation of the remedies available against failing corporations, including those available to minority stockholders, a chapter fertile with valuable suggestions. Then follows a very learned and exhaustive discussion of the subject of assignment for the benefit of creditors and instruments of transfer. Chapters 5, 6 and 7 treat of preferences, including preferences secured by judicial process, in all their various aspects. No better treatment of the subject of preference by insolvent corporations could be found in any other published treatise. He follows to the close of the volume discussions of the law falling naturally under the following chapter headings: Chapter 8, Corporate Mortgages; Chapter 9, Selling Out to New Corporation; Chapter 10, Consolidation; Chapter 11, Creditors' Suits; Chapters 12, 13, 14, 15 and 16, Liability of Stockholders, from every conceivable standpoint, including a splendid discussion of the question: "Extra-territorial Effect of Statutes Imposing Personal Liability of Stockholders;" Chapter 17, Liability of Directors to Corporate Creditors; Chapter 18, Joint and Partnership Liability of Members; Chapter 19, Statutes of Limitations in Actions Against Officers, Members and Stockholders of a Corporation; Chapter 20, Insolvency Laws; Chapter 21, Bankruptcy; Chapter 22, Receivership; Chapter 23, Dissolution and Winding Up.

This work is in no sense a digest of cases jumbled together on some improvised frame work. The text and argument is original and often very pointed and suggestive. This must necessarily be so in treating a subject on which the authorities themselves have not yet fully defined the law and concerning which there is yet considerable conflict of authority. Nor does Mr. Jones hesitate to disagree with the authorities where he believes the courts have gone off into error. A most striking instance of this feature of the work, is Mr. Jones' opposition to the "trust fund" doctrine. Mr. Jones says on this point: "We have gone contrary to most of the text writers and earlier decisions in holding that the assets of a corporation are not a trust fund for the benefit of creditors, but we did this believing that it is the sounder doctrine and one which will be eventually accepted by the courts."

This work is altogether the best treatment of the subject of insolvent or failing corporations than can be found anywhere within the whole range of text book literature. Certainly none so accurately and minutely treated or so exhaustively covered is in print anywhere.

Printed in one volume of 1011 pages and publisher by Vernon Law Book Company, Kansas City, Mo.

HUMOR OF THE LAW.

"You say you acted like a perfect lady throughout?"

"Sure, yer honor; when he tips his hat to me and me not knowin' him, I ups with a rock an' caves in his face."—Houston Post.

Judge (to prisoner).—"We are now going to read you a list of your former convictions."

Prisoner—"In that case, perhaps your lordship will allow me to sit down."—Saturday Evening Post.

Mrs. Dewtell—"I do think Mr. Hankinson is the meanest man I ever heard of without exception."

Mrs. Jenkins—"Why, what's he been doing?"

Mrs. Dewtell—"Sued a man for alienation of his wife's affections and set the damages at only $10."—Judge.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort and of all the Federal Courts.

1. **Accident Insurance**—Cause of Death.—In an action on a life and accident insurance policy, evidence that deceased after being injured died of erysipelas held insufficient to warrant a recovery without proof that the erysipelas was caused by the wound.—McAuley v. Casualty Co. of America, Mont., 96 Pac. 131.

2. **Accord and Satisfaction**—Part Payment.—Payment and acceptance of a less sum than claimed in satisfaction of an unliquidated or disputed claim operates as an accord and satisfaction.—City of Rawlins v. Jungquist, Wyo., 96 Pac. 144.

3. **Acknowledgment**—Validity of Unacknowledged Deed.—A deed, though unacknowledged, is valid as between the parties, and imports a valid consideration, and is not open to collateral attack.—Graves v. St. Louis, M. & S. E. Ry. Co., Mo., 112 S. W. 736.

4. **Admiralty**—Powers of Court.—A court of admiralty has powers as broad as those of a court of equity to compel the production of books and papers, and, if satisfied of the justice of the application by affidavit or otherwise, may require such production on motion.—The Washtenaw, U. S. D. C., E. D. N. Y., 163 Fed. 372.

5. **Adverse Possession**—Disseisin.—Actual possession under claim of right or title to a certain line, claimed as a boundary, though by mistake, maintained for ten years, will work a disseisin of the true owner.—Sommer v. Compton, Or., 96 Pac. 124.

6. **Appeal and Error**—Dismissal.—Plaintiff sued to enjoin a city from executing a contract, and it appeared on the call of the case on appeal that the contract had been duly canceled by the parties. Held, that the writ of error would be dismissed, without prejudice, at the cost of defendant in error.—Baird v. City of Atlanta, Ga., 62 S. E. 525.

7.——Questions First Raised on Appeal.—A party cannot for the first time on appeal raise the question that a jury was not waived, and, where a jury was not waived, he should call the attention of the trial court thereto in the motion for a new trial.—Gillilan v. Schmidt, Mo., 111 S. W. 611.

8. **Assault and Battery**—Acts Constituting.—One who strikes a door, breaking the glass, and driving a piece into the eye of another, commits an assault and battery.—Schmitt v. Kurrus, Ill., 85 N. E. 261.

9.——Justification.—It is no justification of an assault that prior thereto the person assaulted had committed an injury on the person or family of the defendant.—Jackson v. State, Ga., 62 S. E. 539.

10. **Attorney and Client**—Attorney's Authority.—An attorney has no power to delegate his authority to another attorney so as to make the other the agent of his client unless the client consents.—Lacher v. Gordon, 111 N. Y. Supp. 283.

11.——Disbarment.—Ky. St. 1903, Sec. 104, held not to prevent proceedings in the name of the commonwealth for the disbarment of an attorney for his wrongful refusal to pay over to his client money collected.—Commonwealth v. Roe, Ky., 112 S. W. 683.

12.——Disbarment.—A person who secures his admission to practice as an attorney by misrepresentation will be disbarred.—In re Bradley, Idaho, 96 Pac. 208.

13. **Bankruptcy**—Claims Entitled to Priority.—A claim of a landlord against the estate of a bankrupt lessee for repairs which the lessee was required by the lease to make held provable only as an unsecured claim, and not as rent, entitled to priority.—In re Schomacker Piano Forte Mfg. Co., U. S. D. C., E. D. Pa., 163 Fed. 413.

14.——Conditional Sales.—Where ranges were sold to a bankrupt under a conditional sale contract, the vendor's rights thereunder were not affected by the fact that the use of the ranges was inconsistent with the idea of a return, or that the attachment of the ranges to the realty was inconsistent with ownership in the vendor.—In re Cohen, U. S. D. C., E. D. N. Y., 163 Fed. 444.

15.——Contempt Proceedings.—A petitioning creditor who obtained possession of property from the receiver in bankruptcy on claim of ownership, which he was subsequently ordered to return, held concluded by the proceedings and in contempt for failing to obey such order.—In re Strobel, U. S. D. C., E. D. N. Y., 163 Fed. 380.

16.——Discharge.—The right of bankrupts to a discharge held to depend on the validity of a chattel mortgage given by them, and a discharge denied until such question should be determined in proper proceedings.—In re Olansky, U. S. D. C., E. D. N. Y., 163 Fed. 428.

17.——Goods in Transit.—A seller who shipped goods to a bankrupt which had not been delivered by the carrier at the time of the bankruptcy held entitled to exercise the right of stoppage in transitu.—In re Darlington Co., U. S. D. C., E. D. N. Y., 163 Fed. 385.

18.——Jurisdiction of Referee.—A referee in bankruptcy is without jurisdiction to determine the right of an adverse claimant to property which was in his possession prior to the bankruptcy in a summary proceeding by the trustee to require him to surrender the same, even though he appears to contest the same, where his claim is not merely colorable.—In re Walsh Bros., U. S. D. C. N. D. Ia., 163 Fed. 352.

19.——Mode of Review.—The judgment of a

court of bankruptcy determining the claim of a chattel mortgagee to assets in the hands of a trustee in bankruptcy is one on a controversy arising in bankruptcy proceedings and reviewable by the Circuit Court of Appeals on appeal.—Loeser v. Savings Deposit Bank & Trust Co., U. S. C. C. of App., Sixth Circuit, 163 Fed. 212.

20.——Petition.—A petition against a bankrupt for contempt in failing to obey an order requiring the payment of money to her trustee held defective for failure to allege willfulness and ability to comply therewith.—In re Cole, U. S. C. C. of App., First Circuit, 163 Fed. 180.

21.——Preferences.—A payment by a debtor, subsequently adjudged a bankrupt, held not a preferential payment within the bankruptcy act unless the creditor had reasonable cause to believe that the debtor was insolvent.—Stuart v. Farmers' Bank of Cuba City, Wis., 117 N. W. 820.

22.——Provable Claims.—The fact that one who lent money to an insolvent within four months prior to his bankruptcy himself borrowed the money from a bank, pledging the note and security given by the bankrupt as collateral will not affect his right to prove the debt in his own name; and whether it is in fact owned by him or the bank is immaterial.—Ohio Valley Bank v. Mack, U. S. C. C. of App., 163 Fed. 155.

23.——Provable Debt.—The proving and allowance of a claim in bankruptcy proceedings after distribution and entry of order of dismissal held a nullity, and not a bar to an action on the debt, in view of Bankr. Act, Sec. 12, subds. "a", "b", "c", "e".—Troy v. Rudnick, Mass., 85 N. E. 177.

24.——Rents and Profits.—A mortgagee of realty in Pennsylvania whose mortgage exceeds the value of the property is equitably entitled to have the rents and profits of such property collected by a trustee in bankruptcy of the mortgagor, after payment of the taxes applied to the payment of interest on his mortgage.—In re Industrial Cold Storage & Ice Co., U. S. D. C., E. D. Pa., 163 Fed. 390.

25.——Secured Creditors.—The fact that a creditor of a bankrupt, who holds a note of a corporation on which the bankrupt is indorser, sets out in his proof a mortgage given by the corporation as security, does not give the court of bankruptcy jurisdiction to administer the mortgaged property, under Bankr. Act, c. 541, Sec. 57h.—In re Graves, U. S. D. C., D. Ver., 163 Fed. 358.

26.——Voidable Preferences.—Evidence considered, and held insufficient to sustain the burden of proof resting on a trustee in bankruptcy to show that a creditor at the time of receiving payment from the bankrupt had reasonable cause to believe him insolvent, so as to render such payment voidable as a preference.—Getts v. Janesville Wholesale Grocery Co., U. S. D. C., W. D. Wis., 163 Fed. 417.

27. **Benefit Societies**—Corporate Name.—A benevolent insurance association may be sued on a policy in the name by which it designates itself in the policy, and the action is not subject to abatement, though the name varies from the one under which it was incorporated.—Shuler v. American Benev. Ass'n., Mo., 111 S. W. 618.

28. **Bigamy**—Burden of Proof.—Where a legal divorce granted before the second marriage is offered as a defense in a prosecution for bigamy, the burden is on defendant to prove the validity of the decree.—People v. Spoor, Ill., 85 N. E. 207.

29. **Bills and Notes**—Consideration.—The validity of a note given to a university held not destroyed by reason of the consolidation of the university with the college and the removal of the seat of the university to the seat of the college in another town.—Miller v. Central University, Ky., 112 S. W. 669.

30. **Boundaries**—Courses and Distances.—Course and distance must give way to marked lines and corners found on the ground or to established monuments called for in the deed.—Sullivan v. Hill, Ky., 112 S. W. 564.

31. **Brokers**—Action for Commissions.—Owner who sells to purchaser procured by real estate agents held liable to the agent for a commission equal to the difference between the net price which the owner was to receive and the price the purchaser was to pay the agent.—Church v. Dunham, Idaho, 96 Pac. 203.

32. **Carriers**—Act of God.—A carrier is liable for injuries to a passenger; though the immediate cause thereof was an act of God, where the negligence of the carrier concurred in any degree in causing the injuries.—Sandy v. Lake Street Elevated R. Co., Ill., 85 N. E. 300.

33.——Care Required in Operating Trains.—If an engineer knows of a passenger's dangerous position in attempting to board a car, he is bound to operate the train in accordance with such knowledge, otherwise he can operate it in the manner consistent with the safety of those on board.—Newmark v. New York Cent. & H. R. R. Co., 111 N. Y. Supp. 379.

34.——Damages to Shipment.—In an action against a carrier for failure to protect goods from injury by flood, plaintiff must show that the goods were in defendant's possession either as carrier or warehouseman.—Kingman St. Louis Implement Co. v. Southern Ry. Co., Mo., 112 S. W. 721.

35.——Failure to Furnish Cars.—The mere fact that a commodity intended to be shipped is not on the platform of the carrier is not an excuse for the carrier's failure to furnish cars, when the commodity is under the control of the shipper, and ready for shipment in the usual way.—St. Louis Southwesten Ry. Co. v. Leder Bros., Ark., 112 S. W. 744.

36. **Clubs**—Membership.—A member of an incorporated social club must make a strong showing of mismanagement of its affairs by the board of directors before he can be heard to say that such mismanagement has resulted to his injury.—Rollins v. Denver Club, Colo., 96 Pac. 188.

37. **Collision**—Inevitable Accident.—A collision in a river clogged with ice between a vessel which had overtaken and passed another and the latter, which was then following, held due to inevitable accident owing to the ice, which impeded the navigation of both.—The Erandio, U. S. D. C., D. Md., 163 Fed. 435.

38. **Compromise and Settlement**—Consideration.—Where there is an actual bona fide dispute and the parties settle it, the compromise is itself good consideration, and the settlement is binding, without reference to the merits of the original contract.—Kelly v. Hopkins, Minn., 117 N. W. 396.

39. **Constitutional Law**—Grain Inspection.——Laws 1907, p. 285, relating to grain inspection, held invalid because delegating legislative

power to the Board of Railroad and Warehouse Commissioners to determine when and where the law shall be in force.—Merchants' Exchange of St. Louis v. Knott, Mo., 111 S. W. 565.

40.——Liberty to Contract.—The bulk sales law (Act May 13, 1905, Laws 1905, p. 284), making sales of any portion of a stock of merchandise presumably fraudulent as to creditors unless certain procedure is observed, held violative of Bill of Rights, Sec. 1, providing that all men have certain inherent rights, including life, liberty, etc., and section 2, providing that no person shall be deprived of life, liberty, or property without due process of law.—Charles J. Off & Co. v. Morehead, Ill., 85 N. E. 264.

41.——Police Power.—The prevention of discrimination in particular localities in prices of commodities in general use for the purpose of destroying the business of a competitor held within the police power of the state.—State v. Drayton, Neb., 117 N. W. 768.

42.——Reading Parts of Depositions.—Where a party reads portions of the answers to interrogatories contained in a deposition to prove admissions by deponent, the adverse party may read the omitted portions of the answers, where the several portions of such answers are more or less in direct relation.—Culbertson v. Salinger & Brigham, Iowa, 117 N. W. 6.

43.——Special Legislation.—The prohibition of Const. art. 4, Sec. 25, subd. 33, against local or special laws where a general law can be made applicable, leaves the necessity of a special law to the sole discretion of the legislature, with which the courts cannot interfere except in extreme cases.—Board of Directors of Woman's Relief Corps Home Ass'n. of California v. Nye, Cal., 97 Pac. 208.

44. **Contracts**—Legality.—The law will not imply an agreement or obligation on the part of the principal in a bail bond in a criminal case to indemnify his surety, and an express agreement for such indemnity by the principal is illegal and void as against public policy, and will not be enforced by the courts.—United States v. Greene, U. S. C. C., N. D. Va., 163 Fed. 442.

45. **Corporations**—Misappropriation of Funds.—A stockholder of a corporation held without power to settle with the manager thereof for the latter's embezzlement of corporate funds.—Reinecke v. Bailey, Ky., 112 S. W. 569.

46.——Relation to Creditors.—Creditors of a corporation have no lien or claim on its property, though the corporation is insolvent, until the jurisdiction of a court of equity has been invoked to protect the assets.—Curtis, Jones & Co. v. Smelter Nat. Bank, Colo., 96 Pac. 172.

47.——Sale of Stock.—A bona fide purchaser of the stock of a corporation may sue to compel it to enter the assignment on its books and restrain the sheriff from selling the stock on an execution against the vendor.—Everitt v. Farmers' & Merchants' Bank of Elm Creek, Neb., 117 N. W. 401.

48. **Criminal Evidence**—Impeachment of Witness.—Though the violation of a penal statute was not flagrant, and the accusation not strongly supported by the evidence, there being some evidence in support of the verdict, the Court of Appeals cannot interfere.—Roberson v. State, Ga., 62 S. E. 539.

49. **Criminal Law**—Argument of Counsel.—The statute forbidding the state to comment on the failure of accused to testify does not deny its right to characterize testimony to private conversations between witness and the accused as uncontradicted.—Clinton v. State, Fla., 47 So. 389.

50.——Idleness.—While mere idleness may not be denounced as crime, lewdness or dissoluteness, in the sense of unlawful indulgence of lust, whether public or private, may be regulated and prohibited.—Ex parte McCue, Cal., 96 Pac. 110.

51.——Papers Taken from Defendant's Possession.—A defendant in a criminal case held not entitled to a return before trial of papers taken from his trunk by the officers who obtained such trunk by means of a check found on his person when arrested, and which papers were held by the district attorney for use as evidence against him.—United States v. Wilson, U. S. C. C., 163 Fed. 338.

52.——Possession of Burglarious Tools.—On a trial of defendants for having in their possession burglarious tools, intending to use them as such, it was proper to permit the chief inspector of police to testify that the chisel and bags of cartridges found in the tenement of defendants were such as were ordinarily used by burglars and found on or with them.—Commonwealth v. Johnson, Mass., 85 N. E. 188.

53. **Criminal Trial**—Continuance.—Where the adverse party admits that witnesses, if present, would testify as stated in an affidavit for a continuance, there is no ground for reversal because of the refusal of the continuance.—Shumway v. State, Neb., 117 N. W. 407.

54.——Motion in Arrest of Judgment.—A motion in arrest of judgment does not lie for errors in overruling motion for a continuance or in allowing separation of the jury.—Williams v. State, Ga., 62 S. E. 525.

55. **Curtesy**—Extent of Right.—Agreement by wife, tenant in common with her brothers and sisters in lands, subject to the dower and homestead right of their mother, not to partition the lands during the mother's lifetime, held binding on her husband claiming as tenant by the curtesy.—Mathews v. Glockel, Neb., 117 N. W. 404.

56. **Customs and Usages**—Contracts.—Plaintiff, in an action against a telegraph company for delay in transmitting a telegram, held not entitled to show a certain custom of cotton dealers.—Postal Telegraph Co. v. Willis, Miss., 47 So. 380.

57. **Death**—Cause of Death.—If injuries received by decedent, through defendant's negligence, developed tuberculosis in decedent, her husband and minor children could recover, although she was predisposed to tuberculosis and died therefrom.—Chicago, R. I. & G. Ry. Co. v. Groner, Tex., 111 S. W. 667.

58.——Right of Action.—The loss by the death of a son of the expectation of the payment of a debt due from the son to the father is a proper element of damage.—Stangeland v. Minneapolis, St. P. & S. S. M. Ry. Co., Minn., 117 N. W. 386.

59. **Dedication**—Methods.—The statutes prescribing the method of dedicating real property to public uses are not exclusive of the common-law method of dedication.—Cole v. Minnesota Loan & Trust Co., N. D., 117 N. W. 354.

60. **Deeds**—Recordation.—Recording of deed in original county prior to election of officers and perfection of organization of new county, which included the land within its boundaries,

held a lawful recordation.—Sapp v. Cline, Ga., 62 S. E. 529.

61. **Divorce**—Liability for Support of Children.—The liability of the father to support his minor children remains, though in divorce their mother is awarded their custody, where the decree is silent on the subject.—Viertel v. Viertel, Mo., 111 S. W. 579.

62. **Dower**—Improvements on Land by Grantee of Husband.—A widow seeking to have set off to her a distributive share in land conveyed by her husband alone is not entitled to any benefit from the improvements placed on the land by the husband's grantee or those claiming under him.—Warner v. Trustees of Norwegian Cemetery Ass'n., Iowa, 117 N. W. 39.

63. **Easements**—Private Ways.—A "private way" is an easement or right over or under another person's estate which belongs to and is for the use of individuals, one or more, as distinct from a way that is used by the public in general.—Rice v. Wade, Mo., 111 S. W. 594.

64. **Electricity**—Contributory Negligence.—In an action for the death of a child by an electric shock, an instruction held properly refused because casting on defendant the burden of proof of decedent's contributory negligence.—Charette v. Village of L'Anse, Mich., 117 N. W. 737.

65. **Estoppel**—Custody of Children.—In an action by a husband for divorce for desertion, where wife denied authorship of letters in her handwriting asking for reconciliation, she could not thereafter rely on their contents to show that her desertion was not willful.—Blid v. Blid, Neb., 117 N. W. 700.

66. **Evidence**—Market Values.—Market value can be proved only as a matter of opinion by competent witnesses.—City Nat. Bank of Columbus, Ohio, v. Jordan, Iowa, 117 N. W. 758.

67.——Self Serving Declarations.—In an action for the balance due for procuring an order for a machine, pursuant to an agency contract, certain evidence held inadmissible as a self-serving declaration.—Lindquist v. Northwestern Port Huron Co., S. D., 117 N. W. 365.

68. **Federal Courts**—Liability on Supersedeas Bond.—Where the statutes of a state authorize a summary judgment against the sureties on an appeal or supersedeas bond, the circuit and district courts of the United States in that state may render such judgment.—Egan v. Chicago Great Western Ry. Co., U. S. C. C., N. D. Ia., 163 Fed. 344.

69. **Frauds, Statute of**—Parol Sale of Land.—A parol contract for the sale of land is taken out of the statute of frauds by a payment in full of the purchase money and a delivery of possession of the land to the vendee.—Lambert v. St. Louis & G. Ry. Co., Mo., 111 S. W. 550.

70. **Fraudulent Conveyances**—Consideration.—That the consideration was paid to the grantor's near relative does not change the rule imposing on the party assailing the transaction the burden of proving fraud.—Everitt v. Farmers' & Merchants' Bank of Elm Creek, Neb., 117 N. W. 401.

71. **Injunction**—Multiplicity of Suits.—Equity will enjoin trespass to real property in order to avoid a multiplicity of suits, though it is not shown that plaintiff's damages are irreparable, or that defendant is insolvent.—Lambert v. St. Louis & G. Ry. Co., Mo., 111 S. W. 550.

72.——Restricting Use of Property.—Where the owner of property so restricts its use by covenant as to confer upon another a property right therein, subsequent purchaser of the property may be restrained from violating the restricted use of the property, irrespective of privity of contract or estate.—New York Phonograph Co. v. Davega, 111 N. Y. Supp. 363.

73. **Insurance**—Estoppel.—A benefit society held not estopped from pleading its exemption from liability for death of insured, due to his engaging in a prohibited occupation by accepting his dues and assessments.—Crites v. Modern Woodmen of America, Neb., 117 N. W. 776.

74. **Intoxicating Liquors**—License.—One who under one license opens two bars in separate and distinct buildings cannot maintain that he cannot be punished for maintaining either, as one or the other is lawful.—Huber v. Commonwealth, Ky., 112 S. W. 583.

75.——Renting Room for Unlawful Sale.—Under Ky. St. 1903, Sec. 2557, penalizing one who knowingly rents a room to another in which liquor is illegally sold, the knowledge of the landlord which makes him liable held to be in knowing, when he rented the room, that such use was to be made of it.—Commonwealth v. Conway, Ky., 112 S. W. 575.

76. **Judges**—Order of Recusation.—Where there is no contest, resulting in a trial and judgment of recusation, the order of recusation need not be made in open court.—State v. Twenty-First Judicial District Democratic Committee, La., 47 So. 405.

77. **Judgment**—Conclusiveness.—An owner who does not require rival lien claimants to interplead cannot give a judgment in favor of one lienor in evidence on being sued by the other claimant.—Gillilan v. Schmidt, Mo., 111 S. W. 611.

78.——Res Judicata.—A stranger to the record whose rights accrue after a judgment, cannot attack its validity even for fraud, and particularly for alleged irregularities therein, or for matters which might have been set up in defense by the original parties.—Smith v. Elliott, Fla., 47 So. 387.

79. **Jury**—Qualifications of Juror.—The exemption of a person over sixty years from jury service is a privilege, but not a disqualification.—Albany Phosphate Co. v. Hugger Bros., Ga., 62 S. E. 533.

80. **Landlord and Tenant**—Estoppel.—The doctrine that a tenant cannot question the title of his landlord is available to the successor of the lessor, and may be invoked by him in summary proceedings, but, since it rests in the principle of estoppel, it does not obtain where the title is derivative.—Drake v. Cunningham, 111 N. Y. Supp. 199.

81.——Leases.—The rule that a contract between a railway company and individuals as to the location of stations will not be enforced does not control an agreement by a lessor of a business block to furnish it with railway trackage.—Cole v. Brown-Hurley Hardware Co., Iowa, 117 N. W. 746.

82. **Libel and Slander**—Nominal Damages.—While nominal damages may be awarded in libel suits, yet, as a general rule, the law presumes actual damages from the publication of an article libelous per se.—Dorn & McGinty v. Cooper, Iowa, 117 N. W. 1.

83. **Limitations of Actions**—Partial Payments.—Partial payment by a principal on a renewal note held not to suspend the statute of limitations as to the original note as against

the surety thereon.—State v. Allen, Mo., 111 S. W. 622.

84. **Logs and Logging**—Liens.—Where it was agreed that certain laborer's liens on logs and lumber should not be delivered to the assignee until recorded, and they were not so delivered, the assignments carried the liens as well as the debts.—Alderson v. Lee, Or., 96 Pac. 234.

85. **Master and Servant**—Assumed Risk.—A miner injured by the fall of a set of timbers while he was on top of the timbers, at the order of his foreman, held not to have assumed the risk of the injury, though he believed his position unsafe.—Swearingen v. Consolidated Troup Min. Co., Mo., 111 S. W. 545.

86.——Defective Appliances.—Although the electric lighting apparatus in a factory was installed by a competent contractor, the owner is liable for an injury to an employee resulting from its becoming and remaining out of repair, and dangerous.—Aga v. Harbach, Iowa, 117 N. W. 669.

87.——Existence of Relation.—Where, in a manufacturing establishment, it was impracticable for the employees to leave the building for their noonday meal, the relation of master and servant continued during the thirty minutes allowed for lunch.—Riley v. Cudahy Packing Co., Neb., 117 N. W. 765.

88. **Municipal Corporations**—Claims Against.—Where a city charter requires that all claims shall be audited and allowed before an order shall be drawn for their payment, a claim does not draw interest until it has been so presented.—Appleton Waterworks Co. v. City of Appleton, Wis., 117 N. W. 816.

89.——Public Improvements.—Where a city appropriated lots to a public use against which assessment bonds had been theretofore issued, thus making it impossible to enforce the liens of the bonds the city held liable for the amount thereof.—City of Atchison v. Friend, Kan., 96 Pac. 348.

90.——Sidewalks at Different Levels.—A city held not liable for injury to a pedestrian in falling, because of difference in levels of connecting sidewalks, accentuated by an apron joining the two.—McIntyre v. City of Kalamazoo, Mich., 117 N. W. 729.

91. **Negligence**—Condition of Building.—A contractor for the erection of a building who puts up the only means of access to the different floors thereof, and employs a subcontractor to do certain work in the building, held to invite the subcontractor and his employees to use such means of access.—Dougherty v. D. C. Weeks & Son, 111 N. Y. Supp. 218.

92.——Dangerous Contrivances.—A push car left on a railroad track in a street in a populous residence district held a dangerous contrivance, requiring the exercise of ordinary care to prevent injuries to children accustomed to congregate and play there.—Cahill v. E. B. & A. L. Stone & Co., Cal., 96 Pac. 84.

93. **Parties**—Intervention.—After litigation has resulted in a final judgment it is too late for third persons to be allowed to intervene as parties.—Smith v. Elliott, Fla., 47 So. 387.

94. **Partnership**—Evidence as to the Relation.—In an action on partnership notes, in which M., who had assumed payment of and become surety on the notes was made a defendant, and in which a surviving partner filed a cross-petition seeking to cancel notes executed by him to M., evidence offered by the cross-petitioner as to the existence of the partnership and as to the manner of conduct of some of the partnership business was admissible as against M.—Culbertson v. Salinger & Brigham, Iowa, 117 N. W. 6.

95. **Pledges**—Fraud.—The pledgee of personal property fraudulently represented that he had sold the property pledged and sent $20 to the pledger as part of the price, which the latter retained until he discovered the fraud. Held, that the pledgor was not liable for interest on the $20.—Moyer v. Leavitt, Neb., 117 N. W. 698.

96. **Principal and Agent**—Sale of Land.—A power of attorney to sell land, granting full power to do with it as if it were the agent's own property, authorized a sale upon credit, and any disposition of the proceeds which the agent might make would not invalidate the sale, as the purchaser could assume that under the power the agent could dispose of the proceeds as he desired.—Neill v. Kleiber, Tex., 112 S. W. 694.

97. **Principal and Surety**—Liability of Surety.—As a general rule, the liability of a surety is not greater than that of his principal, and he may have the benefit of any defense which the principal pleads or can plead.—City Nat. Bank, of Columbus, Ohio, v. Jordan, Iowa, 117 N. W. 758.

98. **Prohibition**—Jurisdiction.—Prohibition will not lie to an inferior court for want of jurisdiction, until a plea has been overruled by such court, and then only where there is no adequate remedy by appeal.—State v. Twenty-first Judicial District Democratic Committee, La., 47 So. 405.

99. **Property**—Trade Secrets.—A person acquiring knowledge of trade secrets may use them, where the manner of obtaining such knowledge and the use of them do not constitute a breach of faith.—Elaterite Paint & Mfg. Co. v. S. E. Frost Co., Minn., 117 N. W. 388.

100. **Railroads**—Cause of Injury.—In an action by a passenger for assault by the company's servants, an isolated instance of intoxication some three months before the assault was not admissible to show that plaintiff's damages were due to alcoholism, and not the assault.—Fielder v. St. Louis, B. & M. Ry. Co., Tex., 112 S. W. 699.

101. **Reformation of Instruments**—Parol Evidence.—Where the reformation of a written contract is sought for mistakes resulting in the omission therefrom of certain terms, parol evidence is admissible to prove the mistake and the omitted terms.—Hughes v. Payne, S. D., 117 N. W. 363.

102. **Sales**—Action for Price.—A third person leasing from a corporation conducting a department store the cafe in the store building held liable for supplies furnished the cafe.—Franz v. William Barr Dry Goods Co., Mo., 111 S. W. 636.

103.——Bona Fide Purchasers.—The rule that a vendee is not a bona fide purchaser until he has paid the price cannot be invoked against one who has promised to give a consideration for the transfer unless it will hinder or delay the vendor's creditors.—Everitt v. Farmers' & Merchants' Bank of Elm Creek, Neb., 117 N. W. 401.

104.——Legality Under Tennessee.—A contract to furnish fertilizer to a dealer for sale, providing that the title should remain in the seller until sold by the purchaser, and that title to the proceeds should then be in such seller until it was fully paid the purchase price, construed, and held not one of bailment, but of sale, with

an attempt to reserve a lien.—Coweta Fertilizer Co. v. Brown, U. S. C. C. of App., Sixth Circuit, 163 Fed. 162.

105.——Replevin.—A seller, bringing replevin for goods conditionally sold, must show that the price has not been paid.—Brunson v. Volunteer Carriage Co., Miss., 47 So. 377.

106.——When Title Passes.—Where plaintiffs purchased tobacco from defendants, the tobacco to remain on defendants' land as plaintiff's property, the title and right to possession passed upon the delivery and agreement, and the liability of plaintiffs accrued at that time, though the purchase money was not paid.—Andrews v. Grimes, N. C., 62 S. E. 519.

107. **Shipping**—Authority of Master to Make Arrests.—If the authority of a master of a vessel to arrest passengers can be delegated, it must be to a person of known character and judgment, which authority should not be exercised without the master's determining the necessity therefor, unless the ship or other passengers are endangered.—Ragland v. Norfolk & Washington, D. C. Steamboat Co., U. S. D. C., E. D. Va., 163 Fed. 376.

108. **States**—Equitable Actions.—A sovereign who asks for equity must do equity, and an equitable action by the state opens the door to any defense or cross-complaint germane to the matter in controversy that defendant may see fit to interpose.—State v. Kilburn, Conn., 69 Atl. 1028.

109. **Street Railroads**—Injury to Alighting Passengers.—Facts held to require of interurban railway conductor and motorman that they see that no passenger was in the act of alighting before starting the car, which had not come to a full stop, with unusual force.—Heinze v. Interurban Ry. Co., Iowa, 117 N. W. 385.

110.——Negligence.—Where a statute regulating the operation of electric cars is obviously for the benefit of the public in general, a failure to comply with the mandatory requirements of the act is at least evidence of negligence in any action by an individual for injuries.—Fortin v. Bay City Traction & Electric Co., Mich., 117 N. W. 741.

111.——Right of Way in Street.—A street railroad company has not a paramount right of way on every portion of the streets, except at adjoining streets, but has only a paramount right upon its tracks and for a sufficient space for the cars to pass and beyond that has no greater rights than any other person using the highway.—Newman v. New York & Q. Ry. Co., 111 N. Y. Supp. 289.

112. **Taxation**—Tax Deed.—If the assessment of land belonging to "James T." under the name of "Jane T." and a note on the land book opposite the assessment, "not James T.," did not mislead "James T.," he may not avoid the sale of the land for taxation on the ground of the erroneous description.—Yellow Poplar Lumber Co. v. Thompson's Heirs, Va., 62 S. E. 358.

113. **Telegraphs and Telephones**—Damages for Failure to Deliver Message.—It is essential to a recovery for the failure of a telegraph company to deliver a message calling a physician to attend the sender's son that plaintiff show that, had the message been promptly delivered, the physician would have come in response thereto.—Slaughter v. Western Union Tel. Co., Tex., 112 S. W. 688.

114.——Delayed Telegrams.—Punitive damages held recoverable against a telegraph company for negligent delay in delivering a telegram.—Western Union Telegraph Co. v. Hiller, Miss., 47 So. 377.

115. **Trade Marks and Trade Names**—Infringement.—The word "Don Caesar" applied to imported Spanish olives packed in glass bottles by defendant is an infringement of the trade-mark "Don Carlos" previously applied to similar olives similarly packed by complainant.—Gulden v. Chance, U. S. C. C., E. D. Pa., 163 Fed. 447.

116. **Vendor and Purchaser**—Contract to Convey Land.—Demand for and refusal to deliver a deed held not a condition precedent to one's right to recover payments made on contracts to convey land, on the theory of a rescission of the contract.—Smith v. Treat, Ill., 85 N. E. 289.

117.——Unrecorded Deeds.—An unrecorded quitclaim deed is inferior to a subsequent quitclaim deed from the same grantor where the holder of the later deed is a purchaser in good faith for value in ignorance of the former conveyance.—Ennis v. Tucker, Kan., 96 Pac. 140.

118. **Warehousemen**—Contract Creating.—A warehouseman who granted the right to a steamship company to use a room in his warehouse under a wharfage contract, undertaking to guard and protect the same with its other premises, held a bailee for hire, and liable for goods stolen from such room outside of business hours.—Evans v. New York & P. S. S. Co., U. S. D. C., S. D. N. Y., 163 Fed. 405.

119. **Waters and Water Courses**—Appropriation by Town.—In an action to recover damages sustained by the taking of waters from a great pond by respondent town, interest on damages awarded held allowable from the time the waters were diverted.—Dodge v. Inhabitants of Rockport, Mass., 85 N. E. 172.

120. **Wills**—Burden of Proving Undue Influence.—The burden of proof rests upon a contestant of a will alleging undue influence, and such burden is not sustained by a showing that the person who drew the will was a son-in-law of the testator, and that his children will receive valuable legacies thereunder.—Hanrahan v. O'Toole, Iowa, 117 N. W. 675.

121. **Witnesses**—Competency.—Where an executor under a will is incompetent by reason of interest to testify in a suit to set aside as to anything that occurred during the lifetime of decedent, his wife is also incompetent to testify to any such matters.—Jones v. Abbott, Ill., 85 N. E. 279.

122.——Fees.—Members of an unincorporated pilots' association who appeared by one of their members as agent as claimants of a vessel owned by the association when libeled in admiralty held parties in interest in the suit, and not entitled to fees or mileage as witnesses.—The Philadelphia, U. S. D. C., E. D. Pa., 163 Fed. 438.

123.——Hostile Testimony.—Where a witness has failed to testify as expected, the deficiency cannot be made good by the offer in evidence of declarations made by the witness out of court, except where, to the surprise of the party calling the witness, the witness has given affirmative hostile evidence.—In re Dolgert's Estate, Cal., 96 Pac. 266.

124.——Impeachment.—It is not permissible to ask a witness, for the purpose of impeachment, whether he had ever fished with nets, in violation of the fish laws.—Clinton v. State, Fla., 47 So. 389.

125.——Redirect Examination.—Permitting a witness to be interrogated on redirect examination with respect to matters first brought out on cross-examination is not prejudicial error, even though the testimony may be irrelevant.—Mahoning Ore & Steel Co. v. Blomfelt, U. S. C. C. of App., Eighth Circuit, 163 Fed. 827.